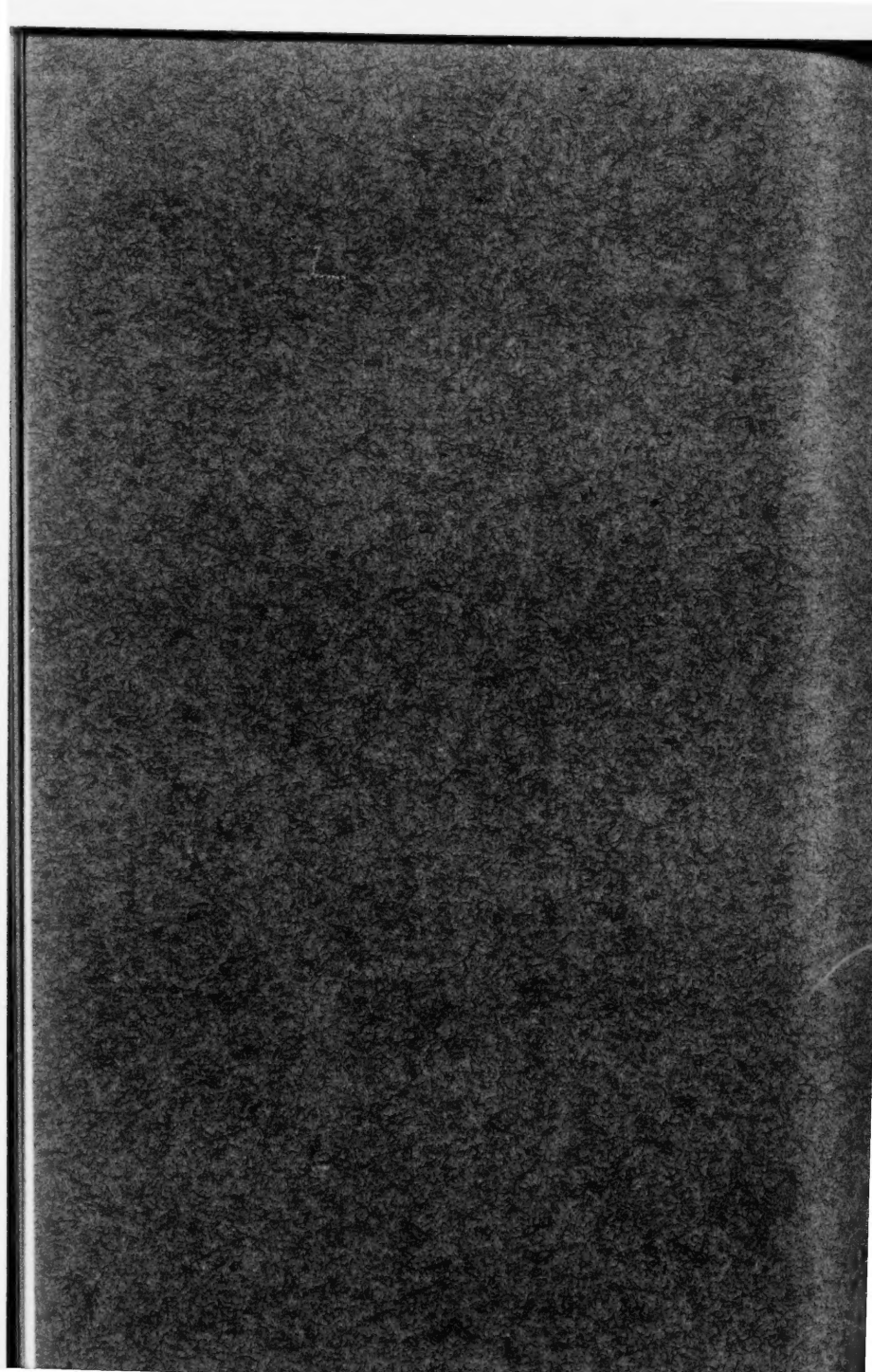


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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 178

JAMES ORVILLE COUCHOIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the circuit court of appeals (R. 93–97) is reported in 142 F. (2d) 1.

JURISDICTION

The judgment of the circuit court of appeals was entered April 22, 1944 (R. 98), and a petition for rehearing was denied May 23, 1944 (R. 101). The petition for a writ of certiorari was filed June 19, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial judge denied petitioner's appointed counsel sufficient time to prepare for his defense, thereby depriving him of adequate representation by counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense.

Section 3 of the Espionage Act of June 15, 1917, as amended (50 U. S. C. 33), provides in pertinent part:

> Whoever, when the United States is at war, * * * shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

STATEMENT

On March 17, 1943, petitioner was indicted in the United States District Court for the Southern District of Alabama on two counts charging violations of Section 3 of the Espionage Act of June 15, 1917, as amended (R. 3–6). Count 1 (R. 3–5) charged that at various times during the period from April 10, 1942, to February 10, 1943, petitioner, while on board the S. S. *West Nohno,* a vessel in the United States Merchant Marine, and while on the high seas, willfully attempted to cause insubordination, disloyalty and refusal of duty in the military and naval forces of the United States by making certain statements, set forth in the count, to specified members of the United States Navy and the crew of the vessel. Count 2 (R. 5–6) charged that petitioner obstructed and attempted to obstruct the recruiting or enlistment service of the United States by the conduct described in Count 1. Petitioner was found guilty by a jury on both counts (R. 8) and was sentenced generally to imprisonment for a term of five years (R. 8–9). Upon appeal to the Circuit Court of Appeals the judgment was affirmed (R. 98), the court finding that the only claim for reversal warranting any detailed consideration was petitioner's contention that he was deprived of adequate representation by counsel because the trial judge denied his motion for a continuance made immediately prior to trial (R. 93–97).

As disclosed by the bill of exceptions and uncontradicted allegations in affidavits annexed to a motion for a new trial, the facts either within the knowledge of the trial judge or of which he was presumably aware when he denied the motion for a continuance made by petitioner's appointed counsel, are:

Shortly after the returning of the indictment on March 17, 1943, petitioner "contacted the clerk of District Court in regard to subpoenaing my witnesses and in regard to making a Pauper's Oath. I was informed by the clerk that the law was that the government would not subpoena witnesses who were distant more than one hundred miles from the court where the defendant took a Pauper's Oath. All of my witnesses were more than one hundred miles from the court" (R. 13). Evidently, they were also beyond the trial district. 28 U. S. C. 656 permits the calling of defense witnesses at Government expense only if they are within the district or within one hundred miles of the place of trial.

During the period prior to trial petitioner engaged in correspondence with the United States Attorney and the district judge "relative to the subpoenaing of my witnesses." The former arranged for the Federal Bureau of Investigation to aid petitioner in locating his witnesses, but he advised petitioner that the Government would not bring his witnesses to Mobile, the place of trial, at the Government's expense (R. 14–15).

When the case was called for trial in June, 1943, petitioner appeared without counsel or witnesses. On the Government's motion, and with petitioner's consent, the case was continued until August 2, 1943. Sometime prior to that date, the United States Attorney having advised petitioner that the Government expected to be ready for trial on that date and that if for any reason petitioner desired a continuance he should write to him or the judge, petitioner wrote to the judge requesting a continuance, the reasons for which do not appear in the record. He was advised that a jury panel had already been subpoenaed and that his request for a continuance could not, therefore, be granted (R. 16).

When the case was called for trial on August 2 "the Court asked the Defendant whether or not he was ready for trial, and whether or not he was represented by counsel." Petitioner stated "that he had received a promise from a source that he could not divulge that witnesses would be present to testify, that he expected counsel to be present, that he did not see any counsel in court and had not seen his witnesses, but that he supposed he was as ready for trial as he ever would be." (R. 31–32.) The court immediately appointed Mr. Sam W. Pipes to represent petitioner. Mr. Pipes made an oral motion that the case be continued "so that he could discuss the case with the defendant and arrange for the attendance of wit-

nesses." "The Court stated that defendant was aware of the day of the trial, that he had written both the Court and the District Attorney in regard to witnesses and had been offered by the Court and the District Attorney their cooperation in securing his witnesses, that the Government's witnesses had been brought to court, that they were Navy men and that the trial could not be postponed at this date." While the trial judge overruled the motion for a continuance, he said that he would give petitioner and his counsel "such time as they might require for the defendant to acquaint counsel with the nature of the case." A jury was then impanelled and the court recessed from 11:30 until 2:30 P. M. At 2:30, when the court reconvened, the judge asked whether the parties were ready for trial; the Government announced that it was, and "the defendant announced that he was ready." The case accordingly proceeded to trial (R. 32). At no time during the five-day period the trial lasted did petitioner express any dissatisfaction with his counsel or with the manner in which counsel was conducting his defense, nor was any request made for additional time to secure the attendance of witnesses or to make other preparation for petitioner's defense (R. 33–85).

Without reciting the evidence at the trial in detail, since, of course, the guilt or innocence of petitioner is not the question involved, suffice it to say that the bill of exceptions contains (R. 33–60)

the testimony of a number of members of the naval armed guard and a member of the merchant crew of the S. S. *West Nohno* as to various utterances made by the petitioner to them, during a 9-months' cruise of the vessel, criticising the participation of this country in the war and contrasting the better pay and conditions of those who were merchant seamen with those who were on the same vessels as naval personnel (see, *e. g.*, R. 33–41, 53, 54, 58). There was also testimony that these statements caused disaffection in the armed guard (see, *e. g.*, R. 34, 37, 43, 46–47). Each of the Government's witnesses was subjected to cross-examination by petitioner's counsel (see, *e. g.*, R. 34, 36, 38, 40, 41, 43, 45, 48, 55, 59, 85). Petitioner's defense consisted, in addition to his own testimony, of a stipulation that, if present, six named members of the merchant crew would have testified in substance that they did not hear petitioner make any of the statements set out in the indictment (R. 60–62). In his own behalf petitioner testified fully concerning his activities on the S. S. *West Nohno*. In respect of the statements attributed to him by witnesses called on behalf of the Government, he denied making some and claimed that others were parts of conversations related out of context, and he further testified that he never attempted in any way to create insubordination or disloyalty among any members of the

armed guard or to discourage anyone from enlisting in the Navy (R. 65–80).

After the jury returned its verdict of guilty and petitioner had been sentenced, petitioner's appointed counsel filed a motion for a new trial which, in addition to alleging that the trial court had erred in overruling his objections to certain questions and that the verdict was not supported by substantial evidence and was contrary to the weight of all of the evidence, also alleged that the court committed error in denying his motion for a continuance at the beginning of the trial, and that petitioner had been deprived of a fair trial because he did not have an opportunity properly to prepare and present his case and because his witnesses were not present to testify (R. 9–10). In support of the latter allegations counsel annexed to the motion affidavits by petitioner and himself. In addition to facts which have heretofore been set forth, petitioner's affidavit (R. 11–17) recited his efforts, without success, to obtain counsel and assistance in securing the attendance of witnesses through the National Maritime Union and other organizations. He also claimed that there were "many facts and circumstances relating to the charge for which I was tried that I was not able to convey to my court-appointed attorney and there were many facts that I feel should have been brought out on the trial that were not brought out." The affidavit of the attorney (R. 17–20)

recited the circumstances of his appointment to represent petitioner, his unfamiliarity with sedition cases, his efforts to familiarize himself with the case, particularly through a conference which he had with petitioner at the noon recess on August 2, the difficulties arising because of his inability to obtain and confer with witnesses and his unawareness of various facts and circumstances which were brought out at the trial but had not been disclosed to him by petitioner. After hearing arguments by the United States Attorney and petitioner's appointed counsel, the court denied the motion for a new trial (R. 23–24). Thereupon petitioner's appointed counsel took an appeal, drafting the necessary papers (R. 24–28, 87–90), and prepared and settled a bill of exceptions (R. 86).[1] In the Circuit Court of Appeals the case was handled by other counsel (R. 93).

ARGUMENT

The gravamen of petitioner's complaint is that his appointed counsel was not given sufficient opportunity to prepare for his defense but was forced into an immediate trial (Pet. 4–5). There is, we submit, no basis in the record for this contention.

1. The case did not finally come on for trial until, after one resetting, a period of over four

[1] The petition for a writ of certiorari indicates that this task was undertaken without the aid of a stenographic transcript (Pet. 13).

months had elapsed from the date the indictment was returned. Petitioner had previously been advised by the trial judge that a continuance could not be had as a jury panel had already been subpoenaed. Yet he appeared on the scheduled trial date without counsel or witnesses. He gave no explanation to the trial judge for their absence other than that he expected them to be present. Indeed, he stated to the trial judge that he could not divulge the source of a promise that he had received that witnesses would be present to testify and concluded by saying that "he supposed he was as ready for trial as he ever would be" (R. 31–32). Obviously there was not in these statements anything which warranted the trial judge in believing that counsel or witnesses would soon, if ever, be available; indeed, the fair inference was that petitioner was without hope of receiving such aid. Moreover, so far as witnesses were concerned, it is fair to assume that the trial judge, as well as the United States Attorney, knew that although both had offered their cooperation in securing witnesses for him, petitioner was himself financially unable to bring them to Mobile[2] where the trial was required to be held.[3] It was

[2] As indicated in the Statement, *supra*, p. 4, petitioner had been in correspondence with both the United States Attorney and the trial judge "relative to the subpoenaing of my witnesses."

[3] The offenses were alleged to have been committed on the high seas (R. 4, 5) and petitioner first reentered this country at the Port of Mobile (R. 83). 28 U. S. C. 102 provides

also apparent that the Government could not bear the expense of having the witnesses brought to Mobile because of a statutory prohibition.

On the day the trial was scheduled to begin the Government had, however, assembled members of the naval armed guard as witnesses. It was essential that they be returned to their posts of duty as expeditiously as possible. In addition, a jury panel had been subpoenaed for the trial and the prospective jurors were present in the courtroom waiting to be called.

In the face of this situation and the quite definite indication by petitioner that he was without hope of securing expected legal assistance or of obtaining witnesses through the aid of an unrevealed benefactor, the question which presents itself is whether an abuse of judicial discretion resulted from the action which the trial judge took to accommodate the conflicting interests. We submit that he took the only course that was reasonably open to him. He immediately appointed counsel to represent petitioner. Counsel naturally sought a continuance so that he could discuss the case with the defendant. But he also sought a continuance upon the further ground that he desired to "arrange for the attendance

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that "The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

of witnesses." He explains in his affidavit in support of the motion for a new trial that petitioner "stated that he had the names of several witnesses who were not present that he desired to testify in his behalf" (R. 18). These witnesses were obviously more than one hundred miles from the place of trial or they would have been brought in at Government expense, and even if they had been obtainable, negotiations for their presence would necessarily consume considerable time. It is evident, therefore, that what counsel was seeking was not a mere temporary postponement of the trial but a postponement of some considerable duration. The trial judge would not have been justified in granting any such adjournment in the face of the considerations which called for a prompt trial, as contrasted with the hopelessness manifested by petitioner of ever obtaining from an outside source the necessary financial assistance to secure witnesses and the judge's prior knowledge that petitioner was unable, himself, to bear this expense. There is certainly no basis, therefore, for any contention that the trial judge abused his discretion in refusing a continuance of the character sought. But the trial judge did not entirely shut the door on counsel's motion. Counsel, having been just appointed, was of course, entitled to a reasonable time to familiarize himself with the case. The court ac-

cordingly stated that "he would give defendant and his counsel such time as they might require for the defendant to acquaint counsel with the nature of the case" and, after striking the jury, declared a recess from 11:30 until 2:30 (R. 32). This apparently was satisfactory to petitioner and his counsel since neither made any objection. When the court reconvened at 2:30 the defendant was asked by the trial judge whether he was ready for trial and he announced that he was. Certainly, if petitioner had not fully informed counsel of the relevant facts of the case, and more time was necessary, that was the time for him or his counsel to speak. Instead, petitioner stated that he was ready for trial. In these circumstances no reason appeared why the court should not proceed with the trial of the case. It is evident, therefore, that there is no support for the charge that petitioner was forced to "an immediate trial" without giving his counsel opportunity to familiarize himself with the case.

2. Much of the petition for a writ of certiorari is devoted to a criticism of the way petitioner's appointed counsel handled the case (Pet. 10–13), but it is significant that at no stage of the trial did petitioner protest that his interests were not being adequately protected, although the record discloses that he was, evidently, a man of some education, intelligent, and aggressive. At the trial petitioner was characterized by the command-

ing officer of the naval armed guard aboard the *West Nohno* as "an intelligent man * * * trained in debate and logic" (R. 51). The draft of a contract which he prepared for submission to the commanding officer of the armed guard confirms this characterization (see R. 70–74). Petitioner was the official union representative of the merchant crew in its relations with the ship's commanding officer (R. 45, 52, 65, 67). In the performance of his duties in that capacity he proved himself to be a skilled and alert representative who was familiar with union rules and relevant War Shipping Administration Orders (see *e. g.*, R. 36, 37, 42–43, 44, 48, 52, 53, 56, 58, 67, 68). Additionally, the affidavit he filed in support of his motion for a new trial (R. 11–16), in detailing his actions prior to trial in seeking legal aid through his union and other agencies and in attempting to secure the presence of desired witnesses at his trial, reveals a course of conduct which indicates that petitioner was quite aware of his legal rights and of what was necessary to protect them.

Specifically, it is asserted that appointed counsel should have objected to certain testimony (Pet. 10) and that he should have moved for a directed verdict (Pet. 11–12). Aside from the fact that, petitioner indicates (Pet. 13), the record was made up from memory and not on the basis of a stenographic transcript and hence may not reflect all that took place at the trial, it is clear, of

course, that such a complaint could not prevail if, as the Circuit Court of Appeals pointed out, petitioner had had counsel of his own choosing; there must be an end to litigation sometime. Certainly, the test in determining whether an indigent defendant has been afforded adequate legal representation cannot be that some other attorney might have proceeded differently, when the case is viewed in retrospect. It is sometimes better trial strategy to forego frequent objections and exceptions to evidence and concentrate on convincing the jury that the defendant is innocent and should be acquitted than it is to attempt to build up an appellate record which may eventuate in a reversal but require a new trial. If there was any fundamental error in the admission of evidence, appellate counsel could, of course, have urged it under the "clear error" doctrine despite the failure of appointed counsel to object. While, so far as appears from the record, no motion for a directed verdict was made, the pivotal issue which evolved was whether the jury should believe the testimony of the Government witnesses or that of the defendant,[4] and of course it must

[4] The Circuit Court of Appeals, after examining the record, stated that "the record does not at all support the claim made that it is clear that a verdict for defendant was demanded." Since petitioner was sentenced generally to five years' imprisonment, a valid conviction under either of the two counts would sustain his conviction. *Hirabayashi* v. *United States*, 320 U. S. 81, 85.

be assumed that the case was submitted to the jury on correct legal principles, since the charge is not incorporated in the record.[5]

When the record is viewed as a whole it is clear, we submit, that petitioner's counsel performed his "full duty intelligently and well", which is all that is required of appointed counsel. Cf. *Avery* v. *Alabama,* 308 U. S. 444, 450. We have recited in detail (*supra,* pp. 5–9), from the beginning of the trial right through to the taking of an appeal, the steps petitioner's counsel took to safeguard his interests. His task was rendered particularly difficult because of petitioner's inability to pay the costs of bringing his witnesses to Mobile from various parts of the country. But he secured the best posssible substitute for oral testimony of the witnesses. He obtained from the United States Attorney a stipulation (R. 60–62) as to the testimony six members of the merchant crew of the *West Nohno* would have given had they been present, and this stipulation was introduced as a part of petitioner's defense, although the proffered testimony had not, of course, been subjected to the scrutiny of cross-examination. In summary, in a situation necessarily difficult because of factors beyond the control of anyone,

[5] Cf. *Hall* v. *United States*, 48 F. (2d) 66, 68 (C. C. A. 9); *Kanner* v. *United States*, 34 F. (2d) 863, 867 (C. C. A. 7); *Brown* v. *United States*, 32 F. (2d) 953, 954 (App. D. C.); *Harrod* v. *United States*, 29 F. (2d) 454, 455 (App. D. C.).

appointed counsel did as well in safeguarding petitioner's interests as reasonably could have been expected.

3. Petitioner's motion for a new trial and supporting affidavits did not in any wise alter the basic picture (R. 12–22). Indeed, the affidavit of petitioner makes it quite apparent that, as he indicated at the beginning of the trial, he had little, if any, basis for hoping that he would receive from a source which he refused to reveal either legal assistance or financial aid in procuring witnesses (see R. 13, 14, 16). The court did not abuse its discretion in denying the motion for a new trial. The reasons which justified it in refusing to authorize a prolonged delay of the trial amply supported its overruling of the motion for a new trial.

4. The cases upon which petitioner relies (Pet. 13–16) are factually dissimilar from the present case. In none of them did it appear, as here, (1) that it was unlikely that the defendant would be able to procure witnesses for his defense regardless of the length of time that trial was delayed, or (2) that the trial judge allowed appointed counsel to take such time as he needed to familiarize himself with the case, or (3) that the defendant consented to the commencement of the trial by advising the court that he was ready for trial.

CONCLUSION

There is no basis on the present record for the contention that the trial court failed adequately to provide petitioner with representation by counsel. We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

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